

EXHIBIT B

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -
4 NUVASIVE, INC., : CIVIL ACTION
5 Plaintiff, :
6 v. :
7 GLOBUS MEDICAL, INC., :
8 Defendant. : NO. 10-849-LPS
9 - - -

10 Wilmington, Delaware
11 Thursday, November 3, 2011
12 **TELEPHONE CONFERENCE**

13 BEFORE: HONORABLE LEONARD P. STARK, U.S.D.C.J.
14 - - -

15 APPEARANCES:

16 FISH & RICHARDSON, P.C.
17 BY: TARA D. ELLIOTT, ESQ.

18 and

19 FISH & RICHARDSON, P.C.
20 BY: MICHAEL A. AMON, ESQ.
(San Diego, California)

21 Counsel for NuVasive Inc.

22 POTTER, ANDERSON & CORROON, LLP
23 BY: RICHARD L. HORWITZ, ESQ.

24 and

25 Brian P. Gaffigan
Registered Merit Reporter

1 APPEARANCES (Continued) :

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WINSTON & STRAWN, LLP
BY: SHANE A. NELSON, ESQ.
(Houston, Texas)

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Counsel on behalf of Globus Medical, Inc

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P R O C E E D I N G S

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(REPORTER'S NOTE: The following telephone

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conference was held in chambers, beginning at 1:50 p.m.)

12

THE COURT: Good afternoon, everybody. This is

13

Judge Stark. Who is there, please?

14

MR. HORWITZ: Good afternoon, your Honor. It's

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Rich Horwitz in Wilmington for Globus; and with me is Shane

16

Nelson from Winston & Strawn.

17

THE COURT: Okay.

18

MS. ELLIOTT: Good afternoon, your Honor. This

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is Tara Elliott with Fish & Richardson on behalf of the

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plaintiff NuVasive; and I have with me my counsel, Michael

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Amon from the San Diego office.

22

THE COURT: That is everybody, correct?

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MR. HORWITZ: Yes, your Honor.

24

THE COURT: All right. I have a court reporter

25

here with me; and this is our case of NuVasive Inc. versus

1 Globus medical Inc., our Civil Action No. 10-849-LPS.

2 Today's call is to address the request from
3 defendant Globus to require the plaintiff to reduce the
4 number of asserted claims.

5 Having reviewed the letters, let me tell you
6 what my inclination is but certainly subject to hearing
7 whatever else you want me to think and whatever assistance I
8 can get from you on this call.

9 My inclination is to do something along the
10 lines of what is proposed by NuVasive in its letter which
11 would mean something along the lines, or what I am
12 contemplating doing is:

13 First, reducing the number of claims asserted;

14 Second, reducing the number of terms disputed
15 that we will construe in connection with the Markman
16 process, which I know is ongoing; and,

17 Also placing a limit on the number of prior art
18 references that can be asserted as a basis for invalidating
19 patents in suit.

20 So I'm inclined to do all three of those things,
21 make this case more manageable for all of you and for me,
22 and I'm interested in primarily the timing of doing all of
23 that and how extensive a reduction to impose.

24 So with that, let me turn it over to the parties
25 to tell me whatever it is you want me to hear. We'll start

1 first with Globus as you are the moving party today.

2 MR. HORWITZ: Your Honor, this is Rich Horwitz.

3 I'll start, and Mr. Nelson might join in given
4 the guidance that we have already heard from the Court.

5 As far as doing all three, we don't have a problem
6 with that. We think the timing should be different for
7 certain of those elements, and we think the first thing that
8 should happen is there should be a reduction in the number of
9 claims asserted both because of the Markman process and also
10 because of the other issues that are upcoming in this case.

11 For instance, just two weeks from now, on
12 November 16, we're supposed to do our noninfringement
13 contentions. We don't think it's appropriate for us to
14 have to do those contentions on all 55 claims that have
15 been raised by the plaintiff.

16 So we think the first step would be to reduce
17 the number of claims. We've suggested from 55 to 15. We
18 still stand on that suggestion. We think that should be
19 done now or very soon so that it will streamline the process
20 for not just Markman but for the case as a whole going
21 forward.

22 I just want to emphasize that this comes up now
23 because we're kind of in the middle of the Markman process,
24 but the focus shouldn't be necessarily on Markman. It only
25 comes up now because it was just recently when the plaintiff

1 expanded the asserted claims in the end of September, and
2 it just so happened that it was around the time that the
3 Markman exchange was going on, so that is why it kind of got
4 focused here.

5 So that is our position on the claims that are
6 asserted. We think that should happen now.

7 As far as limiting the number of terms that are
8 in dispute, we're in a little bit of a difficult situation
9 here, your Honor. We alluded to it just briefly in the
10 papers that were filed. Frankly, I haven't seen a case like
11 this before, and I'm not going to get into a lot of details
12 about it. But in the Markman briefs that were filed, we
13 filed a brief with our positions and the plaintiff filed a
14 brief that kind of gave the typical background of the
15 invention and some claim construction principles and
16 basically said everything should have its plain and ordinary
17 meaning, so I'm not sure what we're going to be up against
18 once they finally say anything other than that, if they ever
19 say anything other than that.

20 So we're a little bit in the dark on the claim
21 terms in dispute issue, although I will say that we were
22 able to address the terms that we felt were in dispute given
23 the page limits that the parties agreed to and your Honor
24 so ordered. So I'm not sure that that is as big an issue
25 right now. Mr. Nelson might want to chime in when I'm done

1 and say something else about that.

2 On the invalidity contentions, your Honor,
3 frankly we don't think it's appropriate to address that now.
4 They never filed an opening letter so we never filed a
5 response letter so that we could give you our full position
6 on this issue. But I will tell you this much right now.

7 Based on my experience, the invalidity
8 contention or pieces of prior art reduction never happens
9 this early in a case. It always happens much later in a
10 case. Usually, it's not only after the claims have been
11 limited to some extent but it's also after a Markman
12 decision has come out so that you know what you are facing,
13 so you know what claims are at issue, and you know what the
14 construction of those claims are.

15 It would be highly prejudicial for us to be
16 limited in our invalidity contentions at this time, so we
17 would ask that that just be put off. And,

18 We didn't put this in our papers, your Honor,
19 because we never filed a response paper, but we have been
20 following another litigation that NuVasive is in with
21 Medtronic which is out in California, and it's the exact
22 same NuVasive team and so they will be able to address this,
23 but it's my understanding that in that case, NuVasive relied
24 on hundreds of pieces of prior art to invalidate the
25 Medtronic patent, one is prior art to the NuVasive patent

1 in this suit. And,

2 In that case, in June, the final invalidity
3 contentions included approximately 120 references for the
4 three patents, and 82 of those references were for the
5 retractor-related patents which is the prior art to the
6 patent in this suit.

7 As of the end of July of this year, in their 282
8 statement, they relied on 206 pieces of prior art, and the
9 trial was in September of this year, your Honor.

10 We're nowhere in that time frame now, and we
11 don't think that they should be imposed in this case. We're
12 not aware of any case where these kind of restrictions have
13 been imposed on invalidity contentions and the number of
14 prior art references anywhere near as early as they're
15 seeking to do in this case. So we think that should be put
16 off until long after they reduce the number of claims and
17 also long after the Court issues its Markman order, whenever
18 that will be in the future.

19 THE COURT: Okay. Thank you.

20 Mr. Nelson, did you want to add anything?

21 MR. NELSON: I think Mr. Horwitz did a good job.
22 I might add something later on, but for now I'm good.

23 THE COURT: Thank you. Let me hear from the
24 plaintiff.

25 MR. AMON: Your Honor, this is Mike Amon.

1 Starting with the issue of claim construction, as
2 we raised in our papers, in our responsive brief, the number
3 of terms that Globus has put up for claim construction is not
4 tied and there is no direct correlation to the number of
5 asserted claims.

6 In fact, your Honor, out of the 25 terms that
7 Globus has proposed for claim construction, all of them can
8 be found in just eight claims. So there is no guarantee of
9 any kind that if you were to limit the number of asserted
10 claims at this stage, that would in any way significantly
11 reduce the Court's or the party's burden for claim construction.

12 On that same point, of all the claims asserted,
13 55 asserted claims, only four of them are independent. My
14 point in raising that, your Honor, is that even if we were
15 to choose to go with purely independent claims in this case,
16 we would still have to prove up that the defendants meet all
17 the limitations of the independent claims; and, again, that
18 doesn't eliminate the need to construe the terms of the
19 independent claims that Globus has put forward. So I don't
20 believe, and NuVasive doesn't believe, that there is any
21 benefits by reducing the number of asserted claims for claim
22 construction purposes.

23 With respect to reducing the number of asserted
24 claims and what NuVasive views as a corresponding burden on
25 it of reducing the number of invalidity contentions, you

1 know, I think Mr. Horwitz arguments apply equally both ways.

2 We think by limiting the number of asserted
3 claims now, that would prejudice NuVasive from the benefit
4 of additional discovery which we anticipate taking over the
5 next couple of months. And as Globus just articulated, we
6 would very much like to have the benefit of the Court's
7 claim construction in choosing which claims to go forward
8 with.

9 But we don't think that that is absolutely
10 necessary. Our proposal contemplates giving us the ability
11 to take additional discovery and, at a period of time 30
12 days prior to opening expert reports, to limit the number
13 of asserted claims.

14 We recognize that it will be beneficial and more
15 appropriate for Globus to limit the number of invalidity
16 prior art after we have limited or reduced the number of
17 asserted claims, and our proposal contemplates that. So
18 with respect to timing, we think that the time for limiting
19 number of asserted claims should be at some time in the
20 future after we have had the ability to take additional fact
21 discovery that will further shape and define our case, your
22 Honor.

23 THE COURT: Okay. Is that it?

24 MR. NELSON: Yes. I don't know if you have any
25 questions for us, your Honor.

1 THE COURT: No, not as this point.

2 Mr. Horwitz, is there anything else you want to
3 say?

4 MR. HORWITZ: Yes. Just a couple more.

5 As I think I said before, the focus isn't just
6 on the Markman process. I think we're all in agreement on
7 that in terms of the number of claims at issue. But we
8 still have a serious concern about the effect of this on
9 the rest of discovery. I mention in particular the
10 noninfringement contentions that we would have to do in two
11 weeks on the 55 claims. And,

12 I'm not sure what they think the additional
13 discovery is going to do for them. In fact, in looking at
14 their infringement contentions that they have given us even
15 on the newly asserted claims which they gave us at the end
16 of September, there are none of those claims where their
17 contentions are based exclusively on the recent depositions
18 and other things that they have taken. Primarily, it was
19 all based on information that they had long ago. And, I
20 will just give you one example.

21 The newly asserted claim 9 in the '840 patent
22 relies primarily on the same evidence of the previously
23 asserted claims on the '840 patent. I think there were
24 eight claims before and now they've added, I don't know, it
25 looks like about 18 or 20 or 19 more claims.

1 So I don't think they need any more time. I
2 think they may want some more time to drag things out and to
3 keep open all of their options, but in terms of efficiency
4 and narrowing the case and avoiding disputes, we think that
5 the time is ripe to do that now. And,

6 On the invalidity side, I really didn't hear
7 anything to rebut my comments and my understanding of when
8 that typically happens in cases or any reason to change that
9 kind of a process where it's much later in the case.

10 So that's all I have, your Honor.

11 THE COURT: Okay.

12 MR. AMON: Your Honor, if I could address a few
13 more points?

14 THE COURT: Is this Mr. Amon?

15 MR. AMON: Yes, it is. I'm sorry.

16 THE COURT: Go ahead.

17 MR. AMON: With respect to the invalidity
18 contentions, again, it's a balancing of burdens.

19 We have provided detailed contentions and provided
20 them evidence to the documents produced and to deposition
21 testimony taken of why we believe Globus products and surgical
22 technique infringe our asserted patents.

23 It sounds like Globus is just wanting to not to
24 have to respond to an interrogatory asking them to provide
25 their noninfringement positions. I mean I understand them

1 not wanting to spend resources on that, but that doesn't
2 mean that they don't have to do it.

3 We have evidence in support of our asserted
4 claims, and we think that additional discovery will provide
5 us the ability to further refine and make the proper
6 election going forward. But, again, we think requires
7 additional time.

8 With respect to the invalidity contentions,
9 again, it's a matter of equity, your Honor. If you look
10 at their invalidity contentions which are attached as an
11 exhibit to our responsive letter brief, you can see that
12 they have provided over 110 different combinations that are
13 uncharted. They've just said combine A with B with C and
14 that is one combination, and they did that 110 different times.
15 In addition, they provided more than 400 backup references
16 and have reserved the right to add additional references.

17 We have no way of determining what their
18 invalidity case will look like given the lack of specificity
19 in their invalidity contentions.

20 THE COURT: All right. Mr. Amon, what about
21 the procedural argument that they didn't really have a fair
22 chance to respond to this since evidently it was not clear
23 that that was going to be part of what was in dispute today?

24 MR. AMON: Your Honor, we raised that issue with
25 them during the meet and confer. It was also part of our

1 proposal to Globus during the meet and confer process that we
2 would limit the number of asserted claims and, thereafter,
3 within a two-week time frame, we would ask that they limit
4 the number of prior art invalidity sources. So that they were
5 caught off guard, it seems a little disingenuous to me.

6 MR. HORWITZ: Ah.

7 THE COURT: Hold on a second, Mr. Horwitz.

8 Mr. Amon, you propose in your letter that
9 NuVasive would reduce the number of asserted claims by
10 30 days before opening expert reports are due. Do you have
11 that date in front of you?

12 MR. AMON: I believe opening expert reports are
13 due February 17th, your Honor, if memory serves.

14 THE COURT: Okay. Thank you.

15 All right. Mr. Horwitz, you may go ahead.

16 MR. HORWITZ: Yes. Your Honor, on the
17 invalidity point, a couple of points.

18 There are hundreds of prior art references that
19 are listed on the face of the patents in suit, so it's not
20 our fault that there is crowded art in this area. They
21 realized that when they tried to get these patents.

22 No. 1. If they've felt that they had an
23 affirmative issue that they wanted to bring to the Court on
24 the limitation of prior art references, they should have
25 filed an opening letter. They didn't. So it's a fact, we

1 haven't responded to that in writing. We're doing what we
2 can on the phone today.

3 They haven't responded to the very similar
4 case that they've just gone through where they were in
5 our position where they had hundreds of references that
6 they were relying on right up until the time before trial.

7 Your Honor, if we had to limit the primary
8 number of references that we would rely on but not the
9 combinations, I'm not going to go that far because I don't
10 think that is appropriate, we could limit the number of
11 primary references in our expert reports to, say, 25
12 references. We would be willing to do that.

13 Now, the one point that I want to flag for your
14 Honor right now, and I don't know how this I going to shake
15 out, and I know we've had these issues in other cases and
16 it might affect this, and that is we're in the middle of
17 Markman briefing now. We're going to have the argument.
18 Mr. Amon just said the opening briefs are due in February,
19 and if we don't have a decision by then, that may affect the
20 timing. There may be some request to see if we can extend.

21 I'm just not sure where that is going to shake
22 out when we get there but we would be willing to limit
23 around that time to, say, 25 references.

24 THE COURT: As you sit here, Mr. Horwitz, you
25 don't have reason to doubt that February 12th or thereabouts

1 is the date for the opening expert reports?

2 MR. HORWITZ: I can --

3 MR. AMON: Your Honor, this is Mike Amon. I
4 have the order open now, and I can confirm that it is
5 February 17th for opening expert reports.

6 THE COURT: Okay. Thank you for that.

7 So, Mr. Horwitz, you are offering at this point
8 to reduce the number of prior art references by some time,
9 I'm not sure when, before February 17th or just on
10 February 17th in your report?

11 MR. HORWITZ: In our report.

12 THE COURT: Okay. Mr. Amon, do you want to
13 address that real quick? That offer?

14 MR. AMON: Yes, your Honor, I think that, again,
15 that doesn't properly balance the equities. It's better
16 than not limiting them. I will say that. But we would
17 still urge that if we're going to be required to limit the
18 number of asserted claims prior to the filing of expert
19 reports, the same should apply to Globus limiting the number
20 of prior art sources for invalidity contentions. And,

21 Again, it goes to the burden of having to
22 prepare expert reports and responsive positions.

23 MR. HORWITZ: Your Honor, the last word on that.
24 This is Rich Horwitz again.

25 The burdens aren't the same, your Honor. They

1 need to provide a reasonable number of claims that we can go
2 forward with even for our contentions before expert reports.
3 That is why we raised this issue when we did.

4 When we have our noninfringement contentions, I
5 mean, your Honor, we have our noninfringement contentions
6 due in two weeks. They won't have to respond on invalidity
7 until they see our expert reports. They have a pretty good
8 idea of what we're relying on from our contentions, and
9 they'll have a better idea then. And,

10 Still, I haven't heard anything where Mr. Amon
11 has suggested that the equities that he is requesting here
12 are supported by any of the cases that either side has
13 discussed, and the typical pattern that this Court and other
14 courts have done, which is to require some narrowing of the
15 asserted claims much earlier and then, frankly, when we get
16 close to trial -- and I know we have done this with your
17 Honor before, even in the context of a pretrial conference,
18 where the parties say at that point, yes, we're going to
19 limit, we're going to "really" limit now, we're going to
20 "really" limit our number of the claims that we're going to
21 go forward on, and we're going to "really" limit our number
22 of prior art references.

23 But they're not apples and apples, they're
24 apples and oranges, so we don't think we should be held to
25 the same timetable that they should be held consistent with

1 the practice in this court and other courts.

2 THE COURT: Okay.

3 MR. AMON: Your Honor, this is Mike Amon. If I
4 may, just one point.

5 THE COURT: Go ahead.

6 MR. AMON: I take issue with Mr. Horwitz's
7 position that we can determine where they're coming from on
8 validity given the breadth of their invalidity contentions
9 as they stand now.

10 That is the only point I want to raise.

11 THE COURT: Okay. Thank you.

12 Well, let me tell you what we are going to do.

13 In my view, the dispute that is clearly and
14 fully before me is simply the request by Globus that the
15 Court order a reduction in the number of asserted claims.
16 The request is that they be reduced from 55 to 15 and that
17 they be done some time before November 18th.

18 I'm going to grant in part and deny in part that
19 request.

20 I am going to require that the plaintiff
21 reduce the number of asserted claims to 15, which is five
22 per patent, although the number 15 did not need to be met by
23 five per patent. It can be a total of 15 however allocated
24 among the patents in suit as plaintiff wishes. And,

25 I'm not going to make the plaintiff do that in

1 the next week or two. I am going to give them approximately
2 60 days from now to do it. I'll give them until January
3 15th, 2012 to do it.

4 In the Court's view, this balances the party's
5 competing interests as well as the Court's interest in
6 managing this case and all of its other cases in an
7 effective and reasonable and efficient manner.

8 I recognize that this ruling requires, as a
9 consequence, that the defendant will have to provide its
10 noninfringement contentions with respect to all 55 asserted
11 claims that are currently in the case. In the Court's view,
12 given how the case has developed and where we are now, that
13 is not inappropriate. Therefore, that burden is on the
14 defendant and it will have to meet that burden.

15 While I recognize that the parties view it as
16 essentially coincidental that this dispute arose in the
17 middle of the ongoing Markman process, the Court is very
18 focused on the Markman process. Having had a chance to look
19 at your case a bit in the course of preparing for today, the
20 Court is going to, and hereby does, reduce the number of
21 claim terms that are in dispute -- that is, that are not
22 in dispute but the number of disputes that the Court will
23 resolve in connection with the ongoing Markman process.

24 We will resolve no greater than 15 disputes with
25 respect to claim terms in connection with the upcoming

1 Markman hearing.

2 Therefore, in your upcoming answering claim
3 construction briefs, you need, and should, only address a
4 maximum of 15 disputes. And, I'm going to direct the
5 parties to meet and confer and to agree on that list of 15
6 and advise the Court of that list of 15 no later than next
7 Wednesday.

8 Again, while I understand there may be
9 additional disputed terms beyond the 15, it's my view that
10 I am not obligated to resolve every claim dispute that the
11 parties have in connection with the Markman process. I need
12 to resolve them all by the time I charge the jury but, of
13 course, that is a long time away, and there is no guarantee
14 whatsoever, as counsel who have practiced in front of me
15 know, there is no guarantee as to when you will get a
16 Markman ruling, and you should assume for purposes of plan
17 that you will not have a Markman ruling before your expert
18 reports are due, although you may have one but you should
19 assume you won't.

20 All else being equal, the fewer disputes we have
21 to resolve in connection with the Markman process, the more
22 efficient we can be in doing so, and that is part of what
23 motivates the ruling today with respect to the number of
24 disputes that the Court will resolve in connection with the
25 Markman.

1 Finally, in terms of whether the number of prior
2 art references are going to be reduced by court order at
3 this time, I'm not entering any order today. Nothing about
4 what I am saying today constitutes an order directing the
5 defendant to reduce the number of asserted prior art references.

6 However, that being said, everybody recognizes,
7 including defendant, that the number of prior art references
8 is going to have to be reduced, just as a matter of practical-
9 ity. And, it's going to need to be done in a timely manner,
10 but I am not going to impose any specific schedule or number
11 at this time.

12 If the plaintiff wishes to ask the Court to
13 impose a specific reduction and a specific time frame for
14 doing that, then you are hereby authorized to file a letter
15 on that issue due one week before the Markman hearing, and
16 if such a letter comes in, the defendant is given the
17 opportunity to respond to that letter. I'll make that
18 letter due within two days of the plaintiff's letter and
19 that issue as to the timing by which I should reduce the
20 number of asserted prior art references and the timing for
21 doing it will be addressed as part of the Markman hearing,
22 if I do get that dispute.

23 I don't want to have any more argument, but I
24 have said quite a lot and want to make sure I have been
25 sufficiently clear.

1 Are there any questions, Mr. Horwitz?

2 MR. HORWITZ: Your Honor, no questions, but I
3 do still want to keep up the flag that I mentioned, that
4 because of the way plaintiff chose to file their opening
5 brief on Markman, I'm not sure whether we're going to come
6 back to you for more relief either in connection with the
7 report that we give next week or some time after their
8 responsive brief is filed so that everybody will be in a
9 position of having all the arguments in front of the Court
10 by the time we get there for the Markman hearing.

11 THE COURT: Okay. Duly noted. We'll see what
12 happens on that.

13 Is there anything else, Mr. Horwitz or Mr. Nelson?

14 MR. NELSON: No, your Honor.

15 THE COURT: Okay. Mr. Amon?

16 MR. AMON: Your Honor, just one question.

17 So there is no need for us, if we are interested
18 in filing that letter, to call the Court in the future to
19 get a hearing date on moving to limit the number of prior
20 art sources? We can just submit the letter up to one week
21 prior to the Markman hearing; correct?

22 THE COURT: That is exactly right. Yes.

23 Is there anything else?

24 MS. ELLIOTT: Your Honor, this is Tara Elliott.

25 If I may ask one question of clarification?

1 THE COURT: Yes.

2 MS. ELLIOTT: Your Honor permitted an
3 enlargements of the number of pages for briefing. I think
4 that request is predicated on the number of terms that were
5 submitted by Globus. Does your Honor still wish to have
6 that size or volume of briefing or would your Honor want to
7 address that in light of your order of today?

8 THE COURT: I appreciate you raising it, but I
9 have given you the number of pages, so if either side thinks
10 you need them, you may do so. Obviously, just address the
11 15 terms however.

12 Is there anything else?

13 MS. ELLIOTT: No, your Honor. Thank you.

14 THE COURT: All right. Thank you all very much.
15 Good-bye.

16 (Telephone conference ends at 2:22 p.m.)

17

18 I hereby certify the foregoing is a true and accurate
19 transcript from my stenographic notes in the proceeding.

20 /s Brian P. Gaffigan
21 Official Court Reporter
22 U.S. District Court
23
24
25